LAW LETTER

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As Summer approaches, this edition of Law Letter turns its spotlight onto a variety of important recent decisions of our courts dealing with the occupation and sale of land, unlawful tenders, the National Credit Act, the validity of wills, and tax directives. Please remember that the contents of Law Letter do not constitute legal advice. For specific professional assistance, always ensure that you consult your attorney.

RECENT CASES

Constitutional Court

■ Shaping a Better Future

"Equality may perhaps be a right, but no power on earth can ever turn it into a fact."
– Honoré de Balzac (1799 – 1850)

JUDGMENTS OF the Constitutional Court tend to be lengthy. There are reasons for this, among them that the court is often dealing with new areas of law or with the application of existing principles in new circumstances which flow from the rights which are now entrenched in the Bill of Rights Chapter in the Constitution. Another reason for lengthy judgments is that in some cases a number of the presiding judges feel it necessary to express their separate views, even if they all agree on the outcome. In this case, argument was heard in August 2008 and judgment handed down in June 2009. It has only recently been published in the South African Law Reports. It occupies 127 pages out of a total of 325. Five out of the eight justices filed their own reasons although all eight concurred in a short joint judgment which set out the order granted by the court.

On the face of it the principal issue was relatively simple, namely whether the occupiers of the Joe Slovo informal settlement in Cape Town, numbering about 20 000 residents, could be evicted in accordance with legislation to facilitate the development of better-quality housing than the informal housing then occupied by those residents. But, as Judge Zac Yacoob stated in his judgment, the constitutional issues also raised concerned the obligations of the State to provide access to adequate housing in terms of Section 26 of the Constitution as well as whether the circumstances justified the relocation of the residents. In a judgment of the Western Cape High Court the residents had been ordered, subject to certain safeguards, to vacate the settlement. They appealed against this order. The Constitutional Court was thus faced with the unenviable task of having to determine whether the unfortunate residents, some of whom had lived there since the early 1990's, should be forced to move to Delft, about 15 km away.

The legal issues were difficult but the moral issue of a forced removal obviously weighed heavily with the individual judges. Judge Yacoob observed:

> *" . . . the case raises the vital issue as to the circumstances in which large communities can be legitimately relocated from informal settlements in order to allow for the development of housing in the informal settlement areas concerned. . . . It is necessary for this court to grasp the nettle and to determine when and in what circumstances relocation on this massive scale is constitutionally appropriate."*

The court upheld the order of ejectment granted by the High Court but made it subject to lengthy and detailed conditions regarding the temporary removal of the residents, the nature of the temporary housing, the services to be supplied to the residents and the obligation of the developer to allocate a percentage of the new homes to be built at Joe Slovo to current residents. Everything had to be done in terms of *"meaningful engagement"* between the parties and the government was required to treat residents with dignity and respect.

Residents of Joe Slovo Community, Western Cape v. Thubelisha Homes and Others 2010 (3) SA 454 (CC).

Tenders

■ Simply the Best

"I believe that in the end the truth will conquer."
– John Wycliffe (1329 – 1384)

"*CORRUPTION in the tender process is endemic*" observed the Supreme Court of Appeal in this case, an appeal from the Western Cape High Court. It had ordered the City of Cape Town to act against Viking Pony Africa Pumps (Viking) in accordance with regulation 15 promulgated in terms of the **Preferential Procurement Policy Framework Act** of 2000. Regulation 15(1) provides that –

> "An organ of State must, upon detecting that a preference in terms of the Act and these regulations has been obtained on a fraudulent basis . . . act against the person awarded the contract."

Hidro-Tech (Hidro), a competitor of Viking suffered a repeated lack of success in winning contracts put out to tender by the City of Cape Town despite Hidro's lower tender prices. It came to the conclusion that this was due to Viking gaining preference points derived from its Historically Disadvantaged Individuals (HDI) profile.

Hidro had suspicions about the genuineness of Viking's HDI representivity. Having obtained confirmation of its suspicions, it caused its attorneys to write to the City giving details of the alleged misrepresentations. Subsequent correspondence from Hidro's attorneys to the City produced no satisfactory response and Hidro applied to the High Court for an order that the City act against Viking. The order was granted.

In an appeal to the Supreme Court of Appeal, it was argued that the City regarded an investigation of the complaint as necessary but as the investigation had not been completed before Hidro brought its application, the High Court order was premature. It was also contended by Viking that detection in terms of regulation 15 required the fraudulent preference to be proved as a fact and that detection was an administrative act, requiring fairness and a hearing of the party complained against. Not so, said the Appeal Court, because the detection itself did not have the capacity to affect the rights of any person. It then found that the facts alleged regarding the fraudulent procurement were serious but that the City had taken no rational steps to address the complaint. The duty of the City was to act when it "detected" that preference had been obtained on a fraudulent basis. The order of the trial court was correct and the appeal against it was dismissed.

Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa and Another v. Hidro-Tech Systems (Pty) Ltd 2010 (3) SA 365 (SCA).

■ Unlucky Loser

"The bud may have a bitter taste,
But sweet will be the flower."
– William Cowper (1731 – 1800)

CASES ARISING from flawed tenders – too often, sadly, the consequence of corrupt procedures – are regularly reported in the media. In most instances, when faced with a claim by an unsuccessful tenderer who has wrongly been deprived of the right to do the work or provide the services for which it tendered, the courts will set aside the award and order that the unsuccessful tenderer be given the job.

In this case, the Gauteng Department of Public Transport, Roads and Works had invited tenders for the construction of a highway. A tender had been duly submitted by King Civil Engineering Contractors which, in the evaluation process, had scored the highest points, was recommended in a technical evaluation report by the Department's engineer, by the project manager and the functional sourcing team. The tender should therefore have been awarded to King but it was disqualified by the Department due to an error on its part and the contract was awarded to Moseme Road Construction. King's application to the Johannesburg High Court to review the decision to award the contract to Moseme was upheld. The decision of the Department was set aside. There was no point in remitting the matter to the Department for a reconsideration of the tender. Because the contract was "re-measurable", which would allow Moseme to be paid for what it had done, the court ordered that the contract be awarded to King.

In an appeal by Moseme to the Supreme Court of Appeal it was pointed out by Judge Louis Harms that a declaration of invalidity of a tender award could not be considered in isolation and that the court also had to take into account the possible consequences. A balance has to be struck between the interests of the parties to the tender because the setting aside of a tender award, even if it had been incorrectly made, could have catastrophic consequences for the innocent, successful tenderer, and adverse consequences for the public at large. The appeal was thus allowed because the High Court had failed to have any regard to the position of the innocent Moseme or the adverse consequences of its order and had assumed incorrectly that King was entitled to the contract.

Moseme Road Construction CC and Others v. King Civil Engineering Contractors (Pty) Ltd and Another 2010 (4) SA 359 (SCA).

Litigation

■ State Secrets

"Experience is a good teacher,
but she sends in terrific bills."
– Minna Antrim

PRE-TRIAL CONFERENCES in litigious matters are useful and important. They will often lead to a limitation of the issues, agreements can be reached on formal aspects of the evidence to be led and may even result in the case itself being settled.

In this case two owners of properties adjoining the property of the Provincial Government of the Eastern Cape sued the MEC for Economic Affairs, Environment and Tourism for damages. They claimed that the provincial employees concerned had failed to take preventative measures to contain a fire which had spread to their properties.

Prior to the hearing the parties' legal representatives attended a pre-trial conference. The minutes recorded that the Province agreed to concede the owners' case on the merits and that the only aspect remaining in dispute was that of the quantum or amount of damages. On the morning of the trial, a year later, the trial judge asked the representatives of the parties whether any attempt had been made to settle the disputed quantum. The case then stood down for the parties to consider settlement proposals and they subsequently met to do so. At that meeting the attorney representing the Province admitted liability on its behalf in regard to some aspects of the damages claimed, but the dispute in regard to the remaining claims was to proceed. A minute to that effect was signed by the attorneys and advocates for both sides. Subsequently, however, the Province made formal application to the court to withdraw the admissions its legal representatives had made with regard to both the merits of the claim and certain of the damages. The application alleged the existence of a general practice or instruction (one unknown to the owners or their legal representatives) that any member of the State Attorney's office, who was acting for any State department, needed express authority to settle or compromise a claim. In the absence of that authority, the employee of the State Attorney had no power to make the agreements recorded in the minutes.

Generally, in the case of an attorney who has been instructed to act for a client, the client will not be bound by a transaction in which the attorney exceeds his or her express or implied authority. But Judge of Appeal Cachalia approved a statement of the law made in 1918 to the effect that:

> "The authority of a power of attorney which is filed by the client, to carry his case to final end and determination, does include authority to make a *bona fide* compromise in the interests of his client . . . "

If, in the case of the State Attorney, the authority is specifically limited, then the question to be decided was whether, in the absence of actual authority, the attorney had ostensible authority. That is to say, by appointing the office of the State Attorney to defend the action, which necessarily entailed its participating in the pre-trial processes, including pre-trial conferences, did the Provincial government represent to the other side, that the State Attorney's representative had authority to settle the claims? The Appeal Court, differing from the trial court, held that the owners were entitled to assume that a representative of the State Attorney, attending a pre-trial conference, had the authority to do what attorneys usually did at such conferences, namely to make admissions and concessions and to agree on compromises and settlements. The Provincial government was accordingly prevented by law from denying the authority of the State Attorney to conclude the agreements in question.

MEC for Economic Affairs, Environment and Tourism, Eastern Cape v. Kruizenga and Another 2010 (4) SA 122 (SCA).

In Brief

■ Sale of Land by CC

A CONTRACT FOR the sale of land by a close corporation may be signed by a member of the corporation on its behalf without its written authority. Where, however, the corporation authorises a non-member to conclude the sale of immovable property, that authorisation must be in writing in accordance with the provisions of the **Alienation of Land Act**, 1981.

Northview Shopping Centre (Pty) Ltd v. Revelas Properties Johannesburg CC and Another 2010 (3) SA 630 (SCA).

■ Mortgage of Co-owner's Share

A CO-OWNER who has obtained a certificate of registered title reflecting his undivided share in a piece of land may register and freely transfer the whole or a fraction only of the undivided share. The hypothecation or lease of the whole or any fraction of the undivided share may also be registered. Furthermore, a co-owner is entitled to encumber his or her undivided share in the property with a mortgage bond in the absence of knowledge and consent of the other co-owner.

Bonheur 76 General Trading (Pty) Ltd and Others v. Caribbean Estates (Pty) Ltd and Others 2010 (4) SA 298 (GSJ).

National Credit Act

■ Giving and Getting

THE SUPREME Court of Appeal will be required to determine conflicting views that have arisen among provincial divisions of the High Court regarding the interpretation of the **National Credit Act** of 2005. Section 129(1) of the Act provides that if a consumer is in default under a credit agreement, the creditor may draw to the attention of the consumer in writing various steps which are available to the consumer to assist him or her in dealing with the debt. In terms of Section 130(1) of the Act the credit provider may not approach the court for relief unless at least ten business days have elapsed "since the

credit provider delivered a notice to the consumer" as contemplated in Section 129(1).

In the May 2010 issue of *Law Letter* we referred to a judgment delivered by Judge Malcolm Wallis in the Durban High Court in 2009, in which he held that a notice is "delivered" if it is sent by registered post to an address selected by the consumer, irrespective of whether it comes to the attention of the consumer. This decision was in fact in contradiction of an earlier decision in the Durban court by Acting Justice Naidu who held that the legislation requires more than the mere despatching of the Section 129 notice. However, Judge Naidu then went on to allow the credit provider's claim because where the consumer has nominated a domicilium address at which he or she can be sued, proof that the address to which the notice was posted "is in every respect precisely the same" as the domicilium address, is sufficient. Faced with these two decisions, Judge John Murphy in the Pretoria High Court has come to the conclusion that in terms of the Act notice of any default by a consumer must be brought to his or her actual attention and failure to do so will bar the institution of legal proceedings. Now it will be over to the Supreme Court of Appeal to make the final pronouncement.

ABSA Bank Ltd v. Prochaska t/a Bianca Cara Interiors 2009 (2) SA 512 (KZD) – Acting Judge Naidu
Munien v. BMW Financial Services (SA) Pty Ltd and Another 2010 (1) SA 549 (KZD) – Judge Wallis
Firstrand Bank Ltd v. Dhlamini 2010 (4) SA 531 (GNP) – Judge Murphy.

Tax

■ Equity Instruments and Incentives

"To be clever enough to get all that money,
one must be stupid enough to want it."
– GK Chesterton (1874 – 1936)

IT IS common for directors and employees of companies to participate in share-based incentive schemes. The taxation of such schemes is primarily dealt with in Section 8C of the **Income Tax Act**. The South African Revenue Service (SARS) has recently issued an interpretation note in respect of that section, as well as the associated sections dealing with employees' tax obligations.

Section 8C applies to equity instruments that are acquired by virtue of employment or directorship. The terms "equity instrument" is quite widely defined and includes shares and options or rights to acquire shares. Section 8C does not apply to a "broad-based employee share plan" in terms of Section 8B of the Income Tax Act. The basic concept behind Section 8C is that it taxes gains in respect of equity instruments, when those equity instruments vest in the employee or director. The gain is the difference between its market value at the date of vesting and any consideration that was paid for the equity instrument. The gain is subject to income tax, rather than capital gains tax.

The question as to when a particular equity instrument vests in an employee or director is then key to the tax implications. If there are no restrictions placed on an equity instrument, then the answer is straightforward, in that vesting occurs on acquisition. The answer is more complicated where there are restrictions placed on an equity instrument. These restrictions could include anything that prevents the employee or director from freely disposing of the equity instrument at market value or that could result in his forfeiting it for less than market value. A restricted equity instrument vests once all its restrictions fall away, or immediately before its disposal.

As an example, a director participates in a share scheme. He acquires a share for its market value of R100. The rules of the share scheme prohibit him from disposing of the share for a two year period. At the end of that period, the market value of the share is R250. The director will then be taxed on an amount of R150, being the difference between the R250 market value and the R100 consideration that he originally paid.

When a liability arises in terms of Section 8C, there are corresponding employees' tax obligations. There are also a number of anti-avoidance provisions to prevent the objective of Section 8C being subverted through, for instance, transactions with connected persons or the use of trusts and companies to acquire shares.

Estates

■ Death Be Not Proud

MR W P SMITH, the deceased, was a senior pilot employed by South African Airways. About five years before his own death, his wife had died and he had thereafter formed a relationship with "Heather" which contiued until the time of his death. Jeremy Smith (Jeremy) was the only child of the deceased and his late wife.

On 25 February 2007 Heather had gone to work, leaving the deceased at home. On her return she discovered that he had committed suicide by shooting himself. He left a suicide note on the kitchen counter. It was addressed to Heather and expressed his regrets for what he was about to do and asked forgiveness of her and of Jeremy. It also included the following:

"Heather you can have this house, you will obviously? – sell it and should meet all your future needs. Also I authorise Standard Bank to give you immediate access to Plusplan – there is R579 000 which will not leave you battling. . . .There are also several thousand Rands in the bottom drawer of the safe."

"My will is in the Brown envelope in the safe. I leave everything else to Jeremy as stated therein."

The note was signed "Bless you - Wally xxx."

Heather approached the Durban High Court for an order under Section 2(3) of the **Wills Act** of 1953 directing the Master of the High Court to accept the deceased's suicide note as an amendment to his will. The executors of the estate did not oppose the application but Jeremy did so, contending that the note had not been properly executed by the deceased. Heather's application was dismissed by the High Court. She appealed to the Supreme Court of Appeal. It referred to the terms of Section 2(3):

> "Thus if the document in issue is shown to have been drafted or executed by a person, since deceased, who intended the document in issue to be his or her will, or an amendment of his or her will, the court must direct the Master of the High Court to accept that document as a will or an amendment to it."

On the facts the Appeal Court found that the deceased clearly intended the note to be an amendment to his will. There was no ambiguity in his statement that the house should devolve on Heather and, with regard to the instructions regarding the Plusplan account, the deceased clearly demonstrated his wish as to what should happen to the money in that account. His reference to the will in the Brown envelope showed that he was conscious of the fact that he had a will which did not make provision for Heather and hence the instructions in the note to do so.

Acting Judge of Appeal Seriti rejected a contention by counsel for Jeremy that, because the note was merely signed "Wally" and there was no formal signature, the deceased intended only to be giving instructions for the drafting of a formal amendment to his will. The deceased could not have thought that he was drafting instructions for such an amendment when he knew that he was about to commit suicide. The appeal was upheld and an order made directing the Master to accept the note as an amendment to the will.

Smith v. Parsons N.O. and Others 2010 (4) SA 378 (SCA).

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